Supreme Court, U.S.
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No. 84-1986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN FINE, WILLIAM BECKER and PHILIP BECKER, Individually, and WILLIAM BECKER and PHILIP BECKER, d/b/a BECKER & BECKER, all doing business as 649 BROADWAY EQUITIES CO.,

Petitioners,

vs.

BELLEFONTE UNDERWRITERS INSURANCE CO.,

Respondent.

REPLY BRIEF FOR PETITIONERS

CORRECTED COPY

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

Respondent's Brief in Opposition does not come to terms with the principle issues raised by the decisions below, but instead tries to deal with them through diversionary arguments. This Reply Brief is submitted to clarify some significant factual and legal errors in Respondent's brief and to re-focus the Court's attention on the questions before it.

FACTUAL AND LEGAL ERRORS IN RESPONDENT'S BRIEF

1. There Has Never Been Any Finding of "Willfulness"

Respondent has closed its eyes to obvious facts by its bald assertion (at page 7) that there "has not been a 'mistake' " by the initial panel, either in its original opinion or in the denial of the petitions for rehearing.

Respondent simply disregards the plain and explicit holding by the District Court that it *never* made any finding of willfulness:

> There was no such finding, only a finding that the testimony given was false. (C–3)

Respondent likewise disregards the holding of the second panel of the Second Circuit that on the first appeal:

> The opinion did not purport to determine whether false statements in the instant case were willfully made. (D–4)

2. The First Panel's Decision was Based on Two — Exactly Two — Inaccurate ("False") Statements During the Insurance Company's Post-fire Investigation.

Respondent's brief gives the entirely false impression that petitioners were involved in a pattern of deliberate deceptions, by making references to "repeated", "numerous", and "a host of" false statements (at pages 3 and 8), attempting to imply some inherent willfulness. Exactly the opposite was the case — the statements were so *isolated* that no inference could possibly be drawn as to their willfulness.

The precise nature of these statements appears in the District Court's original opinion at A–14. The District Court expressly held that the insurance carrier "failed to establish by a preponderance of the evidence that Fine's heating practices [the subject of the "false statements"] were a proximate cause of the failure of the sprinkler system to work." (A–13).

It needs to be remembered that a finding of willfulness under New York State law may not simply be based on inference but must to be based on a specific finding based on "clear and convincing evidence". *Hutt v. Lumbermens Mutual Cas. Co.*, 95 A.D.2d 255, 466 N.Y.S.2d 28, 29–30 (2d Dep't 1983); *C.E.H. McDonnell v. American Leduc Petroleums, Ltd.*, 456 F.2d 1170, 1176 (2d Cir. 1972).

3. "False Testimony" is not Synonymous with "False Swearing" — the Statutory Standard for Voiding an Insurance Policy.

Respondent's brief uses the terms "false testimony" and "false swearing" interchangeably, as suits its purposes (see pages 3 and 8). This is simply wrong. The two are distinct and different concepts.

"False *swearing*" includes willfulness, *by definition*.

"False *testimony*" does not. Such testimony may be the result of inadvertence, faulty memory, misunderstanding or other causes.

To constitute the statutory defense of "false swearing" and void an insurance policy, "false testimony" must be *both* "material" *and* "willful". That is New York law as recognized by the second panel below (D–5). It was the *second* element — willfulness — which was totally missing from the first panel's determination.

4. The Deitsch Case, While Generally Reaffirming Existing Law, Constituted Controlling New Law on the Very Issue Raised by Respondent Below.

Respondent argued before the second panel that there was no requirement of a finding of willfulness where oral testimony was involved — that the willfulness element only applied to fraudulent statements in a written proof of loss. (Point V of Brief of Appellee in the Second Circuit, dated December 3, 1984, at pages 16–18.) The second panel expressly rejected this contention and ruled that *Deitsch* held otherwise and thereby provided new controlling law as far as the precise issues in this case are concerned. (D–5).

THE QUESTIONS BEFORE THE COURT

I. The Need for New Error-Correction Procedures

A fair system of litigation may not have as its *primary* goal the termination of litigation. Nonetheless, the Respondent apparently would sacrifice justice to efficiency in this and countless other

cases — and most certainly in any other cases where, through error, the Respondent had gained a temporary victory. The basis of Petitioners' argument is that, given the inability of present procedures to address *completely* the need for error-correction, *additional* procedures should be developed.

Petitioners do not argue that present procedures should be replaced. Nor do they argue that Rule 60 be employed to reopen cases as a matter of course. But in limited cases[1] where an egregious wrong has occurred and has gone uncorrected, *some* additional error-correction device is needed.

II. The Decision Below Conflicts With the Decisions of Other Circuit Courts Regarding the Proper Application of the "Law of the Case Doctrine" in Federal Court

The Respondent asserts two erroneous premises — that the first panel of the Second Circuit decided the issue of willfulness, and that the *Deitsch* decision does not provide a basis for reopening the Second Circuit's mandate — and then relies upon those erroneous premises in an attempt to respond to the two independent bases for review advanced in Part II of the Petitioners' brief. The Respondent *does not disagree one whit* with the Petitioners' presentation of the law. Instead, citing those two flawed premises, it argues that the law does not apply here. The premises are wrong — and, thus, Respondent's response collapses.

The Petitioners' brief showed that the decision below, contrary to the rule adopted by other circuit courts, improperly extended law of the case doctrine to preclude litigation of an issue not decided in an earlier stage of the lawsuit. The Respondent's brief merely provides additional authority for the proposition that law of the case should *not* be extended to issues not decided. The Respondent effectively concedes Petitioners' reading of the law. Instead, in the face of frank language in the opinions below to the contrary, the Respondent asserts the issue of willfulness *was*

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[1] A time limitation is only one possibility. Here, for example, the Rule 60(b) Motion was filed before the direct appeal had been completed by the denial of certiorari on the state law matter.

decided! Since this premise is clearly wrong (see item 1 above) the Respondent's argument falls.

Assuming arguendo that, in the instant case, the doctrine of law of the case might have been applied to the issue of willfulness, Petitioners' brief showed that the doctrine should be applied flexibly, under the rule of *White v. Murtha*, 377 F.2d 428 (5th Cir. 1967). Again, the Respondent's brief concedes on the law — arguing instead that the *Deitsch* case should not have triggered the exceptions in *Murtha*. Since this premise is clearly wrong (see item 4 above) the Respondent's argument is self-defeating.

III. The Decision Below Conflicts With the Decisions of Other Circuit Courts Regarding the Proper Application of the Rule of *Erie R.R. v. Tompkins*, 304 U.S. 605 (1938)

In Part III of Petitioners' brief, two independent bases for review are advanced. The Respondent's brief *totally ignores* the first of these points and misperceives (and therefore fails to answer) the second.

As the Petition demonstrates, *Vandenbark v. Owen-Illinois Glass Co.*, 311 U.S. 538 (1941), and a line of circuit court cases conflicting with the Second Circuit's approach in this case, make clear that *Erie* obliges federal courts to apply readings of state law that develop while the case is working its way through the appellate process.[2] The Second Circuit ignored that obligation, and the Respondent's brief does not even attempt to defend that dereliction. That the Respondent's brief *fails to address* the fact that the Second Circuit ignored its obligation to apply the most current reading of state law available is startling — for that error alone is sufficient to justify certiorari (and, given *Vandenbark*, perhaps sufficient to warrant summary reversal).

The Respondent's brief misperceives (and therefore fails to answer) the Petitioners' second — and independent — *Erie* argument. The Respondent misses the fact that the Petitioners' argument treats *not the content* of the Second Circuit's vision of

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[2] Here, *Deitsch* was decided well before the original appeal was completed by the denial of certiorari on the state law matter.

the doctrine of law of the case, but the *source* of that vision. See footnote on page 25 of the Petition. This is a matter on which the circuit courts and scholars are split, as the Petitioners' brief shows, and a matter of great importance.

Instead of addressing the conflict and issue exposed by the Petition, the Respondent attempts to confuse the issue by arguing that, in this case, New York's courts, employing New York's rule of law of the case, would have reached the result that the Second Circuit reached using its "federal rule." A proper application of the New York rule, however, leads to a result opposite from the one reached by the court below. *See, e.g. Foley v. Roche*, 85 App.Div.2d 887, 888, 447 N.Y.S.2d 528, 529 (2d Dep't 1982). See also cases cited in the footnote at page 25 of the Petition.

Without attempting to distinguish the cases cited in the Petitioners' brief, the Respondent advances New York cases for the proposition that, *once the direct appeal process is exhausted*, New York courts usually apply law of the case — even in the face of changes in decisional law. The Respondent concedes that New York courts ordinarily *do not* apply law of the case in the face of changes in decisional law that occur *before* the direct appeal process is exhausted: they conform their decisions to the newly-announced law, even if the case is at the highest level of appeal. In making that concession, the Respondent faces checkmate on the sidebar issue it created — for, in the instant case, the *Deitsch* decision was rendered *well-before* the direct appeal process had been exhausted by the denial of the petition for certiorari.

CONCLUSION

Respondent's brief boils down to the doctrinaire proposition: *even if* the first panel made a mistake which produced a miscarriage of justice, the District Court "cannot ignore" that panel's mandate, and the second panel "properly deferred to the decision of its predecessor panel" (pages 8, 11). The rationale behind this approach is frankly conceded "... there must be some point at which the prevailing party can be free to enjoy the fruits of victory" (page 12). Never mind whether that victory is unjust. This steadfast adherence to formality over substance, to procedure over justice, is exactly what this case is all about.

The petition for certiorari in this case gives the Supreme Court a *unique opportunity* to address the necessity for developing workable procedures within the present court framework to correct significant errors by the Courts of Appeals. The Opinions of the District Court and the Court of Appeals below establish *on their face* a denial of fair justice for which existing procedures simply provide no remedy.

Respectfully submitted,

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